SUPREME COURT, U. S.
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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

No. 75-894

October Term, 1975

JOSEPH NATALE,

Petitioner,

-against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Natale, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered on November 28, 1975, which affirmed a judgment of the United States District Court for the Southern District of New York, entered on a Jury verdict convicting Petitioner on various counts under the indictment herein.

Opinion Below

The opinion of the Court of Appeals is not yet reported, but is printed in Appendix A to this Petition. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

1. The Fifth and Sixth Amendments to the United States Constitution.

2. 18 U.S.C. 891; and 18 U.S.C. 894.

Questions Presented

(1) Whether the Court of Appeals was correct in its interpretation of 18 U.S.C. 894 (Collection of Extentions of Credit by Extortionate Means) by not requiring the Trial Court to charge the Jury that it is an essential element of that crime for the Government to prove that the victim was actually placed in fear of harm by the defendant.

(2) Whether the refusal of the Trial Court to grant the Defendant's request for the production of the Grand Jury testimony of its only witness was a violation of both Due Process of Law under the standards of Procedural Fairness and under the Brady Doctrine and also a denial of the Defendant's Sixth Amendment right to have effective representation at trial.

(3) Whether the defendant was denied Due Process of Law and his right to a Jury Trial when the Trial Court instructed the Jury that two of the three essential elements of the crime were undisputed.

1. Introduction

The Defendant Natale, along with co-defendants Frank Russo and John Conti, were tried under a three count indictment which

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charged them with a conspiracy to collect extentions of credit by extortionate means, with the substantive crime of using such means to collect such extentions, 18 U.S.C. 2 and 894, and with an attempt to obstruct commerce by extortion, in violation of 18 U.S.C. 1951. The Jury found Natale and Russo guilty on the extortionate collection counts, but not guilty on the obstructing commerce count. Defendant Conti was acquitted on all counts. The Defendants Natale and Russo were sentenced to concurrent terms of five years imprisonment on each guilty count.

2. Statement of the Case

The Government's proof at trial was based upon testimony of Peter Amato, a neighbor of the defendant Frank Russo.

In reviewing his background, Amato indicated that he was employed with the Federal Credit Union in 1973 for a period of seven months and was soon discharged from that firm because of his acts of embezzlement. He received a six month suspended sentence for that crime. Thereafter, he was employed by the firm of Barbara Creations, a manufacturer of bridal veils, as a bookkeeper. Amato also embezzled funds from Barbara Creations, admitting that he stole more than $12,000 from that firm before the President of Barbara Creations, Murray Weiss, uncovered his scheme on February 8, 1975.

Amato attempted to borrow money from the Defendant Russo for alleged investment purposes in March of 1974. Russo introduced Amato to Natale for this purpose. Amato testified that they (Russo and Natale) gave him $2,000.00 (R127) and then they (Russo and Natale) told him that it would cost him $75.00 a week, and that this payment was nothing against the loan. He was told that the $2,000.00 could be paid back at any time.

In April of 1974, Amato again contacted Russo for another loan of $500.00. He indicated that the loan was given by Russo, and was repaid in ten weeks in the amount of $950.00.

In September of 1974, Amato again approached Russo and

told him that the Barbara Creations company was having cash flow problems and that if he would be able to loan that company money, he would be able to solidify his position at Barbara Creations. (R137).

Pursuant to this request, in November, Amato had a meeting with Natale, Russo and one Peter Lapin, the accountant and attorney for Natale. During that meeting, there were discussions pertaining to the financial conditions of Barbara Creations.

On December 3rd, Amato met Natale and Russo at Russo's office and was given $10,000.00. Amato indicated that he was told to repay this loan by payments of $300.00 a week. (R 139). Amato then indicated that Natale was called out of the room and Russo told him that it would be a good idea to leave a "token" for the favor, since no collateral was being asked for to secure the loan. He then gave Russo $3,000.00 and Russo told him not to mention the $3,000.00 "token" to Natale. Amato, thereafter, deposited the $7,000.00 into the Barbara Creations account (R140).

On January 22 or 23rd of 1975, Amato called Russo and told him that the Company was overdrawn at the Bank and that he needed more money. He was given $3,000.00 by Natale and Russo. He indicated that he was told to repay this loan back four for three and that the sum of $4,000.00 was to be returned in three weeks.

At this point in the testimony, Amato first mentions the transaction which was the basis for the instant indictment and conviction. On January 31, 1975, he contacted Russo and told him that the Company was again overdrawn at the Bank. He testified that he was given $5,000.00 and was told by the defendants that he would have to repay the sum of $6,500.00 in one week.

On February 5th, he contacted Russo and told him that he needed additional time to make the payments and Russo told him that he would be given until that Friday. On Friday, he called Russo and told him that he didn't have the money and

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didn't know when he could have it. On February 10th, he told Russo that he was trying to get the money but he wasn't having any luck. In the morning of February 11th while he was leaving for work, he met Russo and they traveled to work together in Amato's car. During that car ride, Amato indicated to Russo that he didn't have the money and Russo replied, "Pete you better stop jerking around. You have got to come up with the money by 10:00 o'clock because after a while Joey will just waste you and not worry about the money at all". After this conversation, Amato decided to report this threat to the police.[1]

Pursuant to police instructions, Amato went to see Natale and Russo with a Detective Losito and introduced Losito to Natale and Russo as a friend by the name of Frank Lucas, who had been trying to help him raise the money.[2]

Losito told Natale and Russo that he (Amato) was scared and that he was with him all day. Losito also said that he had dealings with Shylocks before and that he (Amato) was trying to get the money. Natale then replied, according to Amato, "that you and ten guys like your friend or Jesus Christ off the cross couldn't help you if you keep giving me this kind of story about not paying me back. Then the money won't matter. I will kill you" (this conversation is not recorded) (R168).

The next day, Amato called Frank Russo from Barbara Creations and told Russo that Murray Weiss couldn't get the money, that he had been trying to raise it but that he did not have it at that time. Russo asked him how much money Murray's car was worth. He replied $15,500.00 and Russo said "all-right I

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1. It was the contention of defense counsel during the trial that the reason Amato decided to go to the police was to prevent his own arrest for embezzlement from Barbara Creations and not because of the alleged fear generated in him by the defendants.

2. Amato was equipped by the Police with recording devices to record his conversation with Natale and Russo.

will call you" and then ended the conversation (R170).

He spoke again with Russo later that day and, according to Amato, Russo inquired if he had obtained the money and when Amato replied in the negative, Russo said, "Well, you just tell him, Muttel, if he doesn't come up with the money he loses his car and you lost your house". Amato indicated that previously he had given Russo a deed to his house and some gold coins as security before he received the $10,000.00 loan (R172).

On February 13th, Amato went to Russo's office and explained to Natale and Russo that he didn't have the money. Natale assured him that there was nothing to worry about and handed him a yellow sheet of paper. The paper asked for certain information pertaining to the financial condition of the company. On February 14th, Amato again called Russo and told him that he didn't have any money and didn't know when he would have it. Russo ended the phone conversation without giving any answer.

Amato later called back and told Russo that Murray (Weiss) had returned and had $3,000.00 and the stuff Russo requested (referring to the financial information of the corporation . . . (R176).

Thereafter, Amato went to Russo's office and saw Russo, Natale and the third defendant John Conti. Amato then gave Russo $3,000.00, which in turn was given to Natale who gave it to Conti. He also gave Natale the financial information which he previously requested. Natale indicated that he would give this information to Peter (Lapin) and he would know what to do with it (R180).

That night Russo informed Amato that Conti was a "hit man . . . there to size you up in case Amato hadn't paid."

February 16th was the christening of Amato's youngest child and Russo came to Amato's house to congratulate him and spend time with the family (R191). Later in the evening, in Amato's basement, Russo told Amato that he must have the balance of the money by the 18th because the 17th was a holiday.

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On the 17th of February, Amato phoned Russo and told him that Weiss would like to meet him and discuss some arrangements concerning how the money was going to be paid back.

Later that day, Natale and Russo arrived at Barbara Creations where they met Amato, Weiss and Officer Poltorak, who was posing as Leon Hauser, Weiss' partner (R194). At that meeting, Natale wanted to know what arrangements were going to be made to pay back the balance of the money. Weiss replied that "We can make some sort of commitment". According to Amato's testimony, Natale then indicated that he would be willing to lower the "vig" by $500.00 and have the rest of the money paid back in two months. (A reading of the transcript of this conversation gives a completely different version; whereupon the mention of "vig" is brought up by Weiss and most of the conversation of Natale pertains to the past conduct of Amato and the arrangement that could be made for the payment or renegotiation of the loan.)

Amato further testified that he called Russo that night and explained to him that Weiss thought it over and decided not to pay Russo any money.

Amato then indicated that another meeting was arranged at Barbara Creations. At this meeting, Russo was there with Peter Lapin; also present were Murray Weiss, Officer Poltorak posing as Leon Hauser, and Amato. According to Amato, Lapin did most of the talking and inquired of Weiss if he, Weiss, owed Amato any money and whether in fact Amato had an interest in the business. Weiss replied that not only didn't he have an interest in the business but that Amato was stealing from the business, and that he was not responsible for this debt and that he would not pay it (R199). (The transcript of this conversation indicated that Weiss did most of the talking and after Weiss told Lapin about Amato's conduct, Lapin told Weiss he agreed Weiss didn't owe this money.)

Amato testified that during the evening of the 19th of

February, Russo visited him at his house and told him that he (Amato) had lied and that he was now in trouble and to put him "in their good eyes is going to cost $5,000.00 extra for lying to them and stringing them along". According to Amato, Russo then said if he didn't come up with this money that Joey will come into his house and do a job on his wife and children while he watched (R202) (this purported conversation was not recorded).

Even though these purported threats were made, Amato continued to fraternize with Russo and would drive to work with him at least three days a week. In fact, on February 16th, Russo was invited and did in fact attend Amato's son's christening. On that date, he borrowed $100.00 from Russo for the expenses of his son's christening. Amato also revealed that he helped Russo in the preparation of his tax returns and that Russo installed electrical outlets in his house and helped him panel his basement without charging him for these services.

Amato testified that he was never physically harmed in any way by any of the defendants (R228). He also indicated that at the time he received this money he never had the intention of paying it back (R203).

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REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS IMPROPERLY READ 18 U.S.C. 894 BY DELETING AN ESSENTIAL ELEMENT OF THE PROOF NEEDED FOR CONVICTION UNDER THIS STATUTE. THE COURT OF APPEALS ELIMINATED THE NEED FOR THE GOVERNMENT TO PROVE THAT THE COMPLAINANT WAS PLACED IN FEAR OF HARM BY THE DEFENDANT'S ACTIONS. THIS INTERPRETATION OF THE STATUTE IS IN CONFLICT WITH OTHER CIRCUITS WHICH REQUIRE PROOF OF THE VICTIMS' STATE OF MIND AS AN ESSENTIAL ELEMENT OF THIS CRIME. THIS QUESTION IS ONE OF FIRST IMPRESSION IN THIS COURT AND SHOULD BE RESOLVED SO THAT A POTENTIAL DEFENDANT WILL HAVE FAIR WARNING OF THE NATURE OF THE ACTS REQUIRED FOR A CONVICTION UNDER 18 U.S.C. 894.

The Circuit Court found that the failure of the Trial Court to charge that the victim's state of mind was an essential element of the crime of "Collection of extensions of Credit by extortionate means" 18 U.S.C. 894, was not error. This finding was based on the conclusion that the statute deals only with threats of the defendant which would reasonably induce fear in an ordinary person. The Circuit Court held that it is the threat of harm which is prohibited and that actual fear is not an element of the offense.

In support of this conclusion, three Circuit Court opinions are cited, *United States v. Alsop*, 479 F.2d 65 (9th Cir 1973); *United States v. Epps*, 438 F.2d 1192 (4th Cir 1971); *United States v. Brown*, 412 F.2d 381 (8th Cir 1969). Interestingly enough, all three cases do not concern themselves with the statute in question, but rather speak to bank robbery convictions. The

cited cases indicate that actual fear need not be proven. It is submitted that the bank robbery statutes concern themselves with "actual taking" and do not relate to the intimidations needed to convict in contrast with 18 U.S.C. 894. In the bank robbery statutes, the criminal conduct complained of arises from the willful conduct of the accused and the fear in the victim is minimized. However, in enacting Chapter 42 "Extortionate Credit Transactions", Congress incorporated well established principles of Federal decisional law concerning extortion into the Act. Thus, the victim's state of mind is an essential element of the crime. *United States v. Biondo*, 483 F.2d 635, 643 (8th Cir. 1973). *United States v. Nakoldaski*, 481 F.2d 289 (5th Cir. 1973). *United States v. Curcio*, 310 F. Supp 351 (D Conn. 1970).

In construing Sec. 18 U.S.C. 894, one must first examine the definition of the above chapter as expressed in Section 891. Both sub-divisions (6) and (7) of this section, reflect the intent of the Congress to incorporate the accepted principles of extortion, where the conduct both of the defendant and the complainant are necessary ingredients of the crime.

Under these definitions, it was necessary for the Government to prove and the Court to charge that the borrower, Amato, understood the possibility that harmful consequences would be attendant upon default in his loan payments. Hence, it was necessary for the Government to prove that the borrower had such an understanding in that the victim's state of mind is an essential element of the crime. *United States v. Biondo, supra.*

The narrow construction of this statute by the Circuit Court also fails to take into account decisions of other Circuits which spoke to this very issue. For example, in *United States v. DeCarlo*, 458 F.2d 358 (3rd Cir. 1973), that Court was called upon to determine whether a certain letter written by the deceased, the debtor, was admissible in evidence against the defendant as a proper exception to the hearsay rule. The Court admitted the letter and justified such admission to prove the victim's state of mind. The Court stated "the victim's state of

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mind, even subsequent to the initial threat is relevant in determining whether Saperstein (the debtor) was in a state of fear regarding collection of the debt. In footnote 12 of that opinion, it states:

> "It appears that the state of mind of the victim is not only relevant to the crimes charged in the indictment, but is an essential element to be proved by the Government."

That opinion also indicates that Section 894(b) makes it clear that the relevance of the victim's state of mind is an important element of that crime. Also see *United States v. Biondo, supra.*

The Defendant's defense relied on the fact that Amato was never placed in fear, but rather he used the defendant as a vehicle to prevent his own arrest by creating an "illusion of fear". Therefore, the failure of the Trial Court to properly place this important issue and element of the crime before the Jury deprived the defendant of a fair trial.

It is urged that since a basic principle of our criminal law is that the Government only prosecute people for crimes under statutes which fairly and clearly define conduct made criminal, this Court should review and determine whether under 18 U.S.C. 894 the victim's state of mind is an essential element of the crime.

2. THE CIRCUIT COURT OF APPEALS LIMITED THE SCOPE OF THE BRADY DOCTRINE 373 U.S. 83 BY REFUSING TO REQUIRE THAT THE GOVERNMENT PRODUCE THE GRAND JURY TESTIMONY OF A DEFENSE WITNESS PRIOR TO HIS BEING CALLED TO TESTIFY ON BEHALF OF THE DEFENDANT. THAT COURT FAILED TO CONSIDER THAT SUCH DENIAL ALSO DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AT TRIAL.

During the second day of this trial, defense counsel requested from the Court that it be furnished with the Grand Jury testimony of Lapin in preparation for his testimony as a defense witness. Lapin had previously testified as a Government witness before the Grand Jury under a grant of immunity.

The Assistant United States Attorney refused to comply with this request and indicated that his only obligation would be to turn over Grand Jury testimony of prosecution witnesses.[3] Thereafter, the Court ruled that it would deny defense counsel's request, stating "that there is no basis for it whatsoever".

The Circuit Court of Appeals refused to adhere to the Brady Doctrine by holding there was no "suppression" in this case since Lapin was available by subpoena power and appeared and testified without subpoena, therefore, he was a cooperative witness and hence there was no information in the possession of the Government which the defendant would benefit from knowing. This holding fails to recognize that although Lapin testified without subpoena, he was not necessarily a cooperative witness and that in fact part of his testimony was more damaging than beneficial to the defendant. Lapin, when cross-examined by the Court and the Prosecutor, testified about usurious loan

3. Prosecutor was probably relying upon 18 U.S.C. 3500 as the basis for this statement.

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transactions of the defendant which might ave been refuted by his testimony in the Grand Jury.[4]

In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to relevant facts. As was stated in *Wardius v. Oregon*, 412 U.S. 470, (1973) "exceptions to this are justifiable only by the clearest and most compelling considerations". It is respectfully submitted that there was no justifiable reason for the Government to withhold Lapin's Grand Jury testimony. Yet, the disclosure of this favorable evidence should have been mandated under the Brady Doctrine. Also under our adversary system of trial, counsel must be given every opportunity to present an effective defense, by both being able to sustain and rehabilitate his own witnesses. For the Court to curtail this absolute right, was to deny the defendant's Sixth Amendment right to have effective representation at trial.

The Supreme Court, in *Brady v. Maryland*, 397 U.S. 742 (1970), hoped to put an end to the specter of prosecutorial suppression. The Brady decision stated:

> "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In Brady, the Court did not hesitate to indicate that surface justice should not be tolerated:

> "Society wins not only when the guilty are convicted but when criminal trials are fair, our system of the administration of justice suffers when any accused is tried unfairly."

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4. Since Counsel was never shown Lapin's Grand Jury Testimony, we can not be as confident as the Court of Appeals in declaring that such information would be of no benefit to the Defendant.

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Justice Marshall in his concurring opinion in *Moore v. Illinois*, 408 U.S. 786, (1971) stated:

> "The prosecutor knew that evidence existed that might help the defense, that the defense had asked to see it and that it was never disclosed *** It would be inconceivable to permit a prosecutor to adduce evidence demonstrating guilt without also requiring that he bear the responsibility of producing all known evidence tending to show innocence."

Thus, any favorable evidence bearing upon the guilt or innocence of the accused should be provided to defense counsel upon request. This should have included Lapin's Grand Jury testimony.[5] Assuredly, his testimony *tended* to be favorable and in order to properly prepare him as a witness, counsel should have had access to this favorable Grand Jury testimony. Even if counsel had the opportunity of preparing this witness before trial, it is conceivable the important matters revealed in the Grand Jury would have been forgotten by Lapin.

Also, as was evident from his testimony, there is a strong possibility that this witness did not want to fully cooperate with defense counsel in preparation for trial. It must be remembered that this witness could have been indicted as a co-conspirator and, in fact, testified under immunity in the Grand Jury. Conceivably he even violated the defendant's attorney-client privilege when he testified in the Grand Jury. He also conferred with the prosecutor before he testified at trial. Because of these factors, he would possibly be reluctant to confer as freely with defense counsel. As a consequence, counsel should have been allowed to examine the Grand Jury minutes to determine for himself if there was any favorable information in those minutes which could be utilized during the trial. If a reasonable doubt can be created in a jurors mind by the smallest piece of evidence

5. "After an indictment has been founded and the accused apprehended, the veil of secrecy surrounding Grand Jury proceedings may be safely lifted when justice so required" United States v. Alper, 156 F.2d 206 (2nd Cir. 1966).

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or by a single word found in that Grand Jury testimony, it would have been sufficient reason to dictate disclosure. Hence, when guilt or innocence weighs in the balance, the Court and the prosecutor should not hesitate to disclose this testimony.

Also in presenting his defense, counsel should have been provided with this testimony for the purpose of rehabilitating the witness. This is certainly true in this case where this witness had to withstand vigorous cross-examination of not only the prosecutor but also the court.

The prosecutor utilized Lapin's Grand Jury testimony in his effort to cast suspicion and doubt upon the witness' veracity. Certainly equal access to these minutes should have been provided to defense counsel for the purpose of rehabilitating this witness in the eyes of the Jury. Yet, without these minutes, counsel did not have any basis to even lay a foundation for purposes of rehabilitation. *United States v. Youngblood*, 379 F.2d 365 (2nd Cir. 1967).

These minutes also should have been provided so as to enable counsel to properly prepare for his direct examination. For these minutes could have been used for the purpose of refreshing the witness' recollection, and also could have conceivably been admitted into evidence under the rule of past recollection recorded. *Gill v. United States*, 285 F.2d 711 (5th Cir. 1961); *Jackson v. United States*, 250 F.2d 897 (5th Cir. 1958); *United States v. Adams*, 385 F.2d 548 (2nd Cir. 1967). Here, it is obvious that the defense was at the mercy of his adversary, the prosecutor, who was waiting in the wings armed with this Grand Jury testimony, waiting to attack upon any showing of inconsistencies. Yet, without this Grand Jury testimony, defense counsel did not have the same advantage. In fact, counsel would have been precluded from asking pertinent questions of this witness without his first knowing how the witness testified in the Grand Jury.

Thus, the Court's denial of the defendant's request was a clear denial of procedural due process. It was clearly stated in

Wardius v. Oregon, supra:

> *"The ends of justice will best be served by a system of liberal discovery which gives both parties the maximum amount of information* with which to prepare their cases and thereby reduces the possibility of surprises at trial.
>
> * * *
>
> "We find ample room in that system as far as due process is concerned for a rule which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."

Also, this Court recently observed in *United States v. Nixon,* 417 U.S. 790 (1974):

> "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

In conclusion, this Court should reaffirm the saluatory proposition that a criminal trial is not a game of wits between opposing counsel, the one with the greatest resources to be the winner. *Levin v. Katsenbach,* 363 F.2d 287 (D.C. Cir. 1966). For the adversary system of trial "is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right to *conceal* these cards until played". *Williams v. Florida,* 399 U.S. 78, (1970). Therefore it is respectfully urged that this Court rule that under the circumstances of this case, it was a violation of law under both the 5th and 6th Amendments of the United States Constitution, for the District Court to deprive counsel from reviewing the Grand Jury testimony of its only witness, before such witness was called to testify on behalf of the defendant.

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3. THIS COURT HAS RULED IN THE CASE OF *IN RE WINSHIP* 397 U.S. 358, THAT THE DUE PROCESS CLAUSE PROTECTS THE ACCUSED AGAINST CONVICTIONS EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED. THE "WINSHIP RULE" WAS VIOLATED IN THIS CASE, AS WELL AS THE DEFENDANT'S RIGHT TO HAVE A JURY TRIAL WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT TWO OF THE THREE ELEMENTS OF THE CRIME WERE UNDISPUTED.

The Trial Court indicated to the Jury that in order to find the defendants guilty of the crime of collection of extensions of credit by extortionate means, the Government would have to prove the following three elements by proof beyond a reasonable doubt:

1. That from or about January, 1975 until March 18, 1975, Weiss or Amato still owed principal or interest or renewals of loans which had been made to them.

2. That the defendant actually collected or attempted to collect all or part of the principal or interest still owed on the loans by Weiss or Amato.

3. That the defendant knowingly and intentionally used or participated in any way in the use of any extortionate means to collect or attempt to collect the loans or to punish Weiss or Amato for non-payment of the loans. (R591)

The Court then indicated that there appeared to be no dispute in respect to the first two elements of the crime and that only the third element of the crime was in sharp dispute. This comment by the Court invaded the sacred province of the Jury to be the sole and independent arbiters of the facts and denied the defendant due process as well as his constitutional right to a Jury trial (9 Wigmore Evidence #2549, Richardson Evidence [10th Ed #114], Thayer, Preliminary Treatise on Evidence pp. 183-262.)

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Once the defendant pleaded not guilty to the crimes charged, the burden is upon the Government to prove *each* and *every* element of the crime beyond a reasonable doubt. The Court cannot lessen the burden no matter how conclusive it feels that the evidence was demonstrated by the Government. For even if it is assumed that all the evidence is wholly uncontradicted and that the inferences from the evidence all point in one direction, it would still be for the Jury to make that determination. If such were not the case, the Court in essence would be directing a partial verdict which is never allowed in a criminal trial. A.B.A. Minimum Standards, Trial by Jury (1968) 4.7(b) Comment.

The Circuit Court of Appeals determined that this comment by the Trial Judge was not in any sense unfair and that it fell far short of an actual direction that these facts had been proven beyond a reasonable doubt. The Appellate Court found comfort in this Court's opinion in *Horning v. District of Columbia,* 254 U.S. 135, 138 (1920) and by the fact that the Jurors were given the standard or pattern Jury instruction that the Jurors were the sole Judges of facts and not bound by the comments of the Judge.

Although this Court ruled in *Horning v. District of Columbia, supra,* that similar statements did not deprive the Defendant of a fair trial, that decision has been overruled subsilento by the In Re Winship decision. Also see *Christofil v. United States,* 338 U.S. 84 (1949). Additionally, the Horning case is distinguishable from the ordinary criminal case since there the offense of operating without a license did not require proof of criminal intent.[6]

It is an accepted principle of criminal law, that a charge which usurps the function of a Jury will not be saved from error by simply repeating in it from time to time that the Jury and not the Court is the finder of the facts. *United States v. Tourine,* 428 F.2d 865, (2d Cir. 1970).

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6. The Horning decision has been criticized by Moore in his treatise on Federal Practice Vol. 8 No. 30.05. Also see the dissent in that opinion by Justice Brandeis.

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It is respectfully urged that the compelling reasons set forth by this Court in the *In Re Winship* Decision should also prompt this Court to review this conviction. It is submitted that the Trial Court improperly invaded the sacred province of the Jury by its comment that two of the three elements of the crime were undisputed. This remark diminished the meaning and import of the *In Re Winship* Decision. Thus, it is contended that under the "In Re Winship" Rule, a Trial Judge should never instruct a Jury that elements of the crime are not in dispute when such facts have not been agreed upon or stipulated by the defense.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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